

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN PAUL DOTHARD,

Defendant-Appellant.

UNPUBLISHED

February 9, 2010

No. 287581

Ingham Circuit Court

LC No. 07-001550-FC

Before: K. F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of one count of unarmed robbery, MCL 750.530, and one count of armed robbery, MCL 750.529, for which he was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 240 to 480 months. We affirm.

I. Forensic Evaluation

Defendant argues that the trial court erred when it denied his motion to be referred for a forensic evaluation to ascertain his competence to stand trial. We disagree. A trial court's decision concerning a defendant's competency to stand trial is reviewed for an abuse of discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). A trial court's decision to grant or deny a defendant's motion for a psychiatric evaluation is similarly reviewed for an abuse of discretion. *People v Freeman (After Remand)*, 406 Mich 514, 516; 280 NW2d 446 (1979). Absent evidence that raises a bona fide doubt as to a criminal defendant's competence, the defendant is presumed competent to stand trial. MCL 330.2020(1); *Harris*, 185 Mich App at 102. Criminal proceedings may not proceed against an incompetent defendant. MCL 330.2022(1). "The issue of a defendant's competence to stand trial may be raised by either party or the court." *Harris*, 185 Mich App at 102; see also MCL 330.2024. "Upon a showing that the defendant may be incompetent to stand trial, the court shall order the defendant to undergo an examination" MCL 330.2026(1).

The record reflects that while defendant's first-appointed trial counsel filed a motion requesting that defendant be referred to the forensic center for evaluation, defendant vehemently denied that he suffered from a mental illness and argued that he should not be referred to the forensic center. As such, defendant waived this issue for appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). But even if defendant had not waived this issue, based on

our review of the record, we find that the trial court was not presented with any evidence that raised a bona fide doubt as to defendant's competency to stand trial. Moreover, contrary to defendant's argument, defendant did not exhibit any signs that he suffered from a mental illness. We perceive no error in this regard.

II. Waiver of the Right to Counsel

Defendant argues that he is entitled to a new trial because the trial court abused its discretion when it allowed him to represent himself at trial. We review for clear error a trial court's factual findings concerning whether a defendant has knowingly and intelligently waived his or her right to counsel, but review de novo the court's ultimate legal conclusion concerning whether the defendant has effected a valid Sixth Amendment waiver. *People v Williams*, 470 Mich 634, 640, 641 n 7; 683 NW2d 597 (2004).

Defendant's argument is twofold. First, defendant argues that even if he was competent to stand trial, he was nevertheless mentally ill, and accordingly could not competently waive his right to counsel. Specifically, defendant argues that the trial court's failure to refer him for a forensic evaluation prevented the court from determining the extent of his mental illness. As a consequence, defendant contends, the trial court could not validly determine whether he waived his right to counsel. We disagree.

Criminal defendants have a constitutional and statutory right to represent themselves at trial. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1. However, this right is not absolute. *Indiana v Edwards*, ___ US ___, 128 S Ct 2379, 2384; 171 L Ed 2d 345 (2008). An incompetent defendant can neither stand trial, MCL 330.2020, nor waive his right to counsel, *Edwards*, 128 S Ct at 2387; *People v McMillan*, 63 Mich App 309, 313-314; 234 NW2d 499 (1975) (noting that a "[d]efendant's competency is the necessary prerequisite to a valid waiver" of the right to counsel). Again, the trial court was not presented with any evidence that raised a bona fide doubt as to defendant's competency. "[A] competency determination is necessary only when a court has reason to doubt the defendant's competence." *Godinez v Moran*, 509 US 389, 402 n 13; 113 S Ct 2680; 125 L Ed 2d 321 (1993); see also MCL 330.2026(1). For this reason, we find that defendant's reliance upon *Edwards* is misplaced.

Second, defendant argues that the trial court erred when it ruled that he had validly waived his right to counsel. Again, we disagree. Although criminal defendants may waive their right to counsel, several requirements must be met before a defendant may do so. *People v Russell*, 471 Mich 182, 190-191; 684 NW2d 745 (2004). In *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), our Supreme Court set forth the factors necessary to determine whether a defendant has waived the right to counsel. First, the trial court must determine that the defendant's request was unequivocal. *Id.* at 367. Second, the defendant's waiver must be knowingly, intelligently, and voluntarily made. *Id.* at 368. "To this end, the trial court should inform the defendant of potential risks." *Williams*, 470 Mich at 642. Third, the court must determine that, if the defendant represented him or herself, he or she would not disrupt, unduly inconvenience, and burden the court or the administration of court business. *Anderson*, 398 Mich at 368. The trial court must also substantially comply with the requirements of MCR 6.005(D), which states in relevant part:

The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Once a defendant waives his or her right to counsel, the record must at each subsequent proceeding affirmatively show that the court advised the defendant of his continuing right to counsel and that the defendant waived that right. MCR 6.005(E). A trial court's failure to comply with each of these requirements will not render an otherwise valid waiver invalid, as long as the court has substantially complied. See *Russell*, 471 Mich at 191-192.

The record reflects that defendant represented himself in his first trial, which resulted in a mistrial. Defendant also represented himself at his retrial. Having reviewed the record, we find that the trial court substantially complied with the requirements of *Anderson*. Immediately prior to the start of defendant's first trial, defendant's second appointed trial attorney informed the court that defendant no longer wished the attorney to represent him, and that defendant either wanted substitute counsel or to represent himself. The trial court questioned defendant regarding counsel's representations. After the trial court informed defendant that it would not grant his request for substitute counsel, the following colloquy occurred:

The Court: [Counsel] tells me that you want to represent yourself. You are not schooled in the law, sir. I don't think you're going to be able to do that.

Defendant: I'd rather do so then to—because I was there.

The Court: We want you to do whatever you want, Mr. Dothard. I want you to have the trial you want. Okay. If you want to cross examine people and do all that yourself, you go ahead. But I want to caution you, you are held to the same standards as anybody else that comes in here. If you ask questions that are improper and he objects I'm going to sustain them. So I want you to understand that, Mr. Dothard. I want you to understand that we are going to have a trial because you are not manipulating the system any more by filing grievances, by sending letters at the last minute to avoid trial like you've done now twice. So that's all done. We are going today.

Now, [counsel] will be here. And he's here to assist you on procedural matters concerning technicalities, help pick a jury, that type of thing. You want to ask questions yourself, hey, you go right ahead. My own personal comment to you, sir, is that a person that represents himself usually doesn't do a very good job. If I was a Defendant, I wouldn't represent myself. I would have a good lawyer like [counsel] handle the case for me. So I want you to understand. If you want to do that, you are welcome. But [counsel] is here and he will remain her on

this trial throughout the proceedings, whether you like him or not, because I appointed him. You are not entitled to whoever you want or to avoid process by continually firing people. All right? Is that clear?

Defendant: I understand what you're saying.

The Court: So you want to represent yourself?

Defendant: Yes, I do.

Defendant argues that his request was not unequivocal because his decision to represent himself was based on his dissatisfaction with his trial counsel. It is well settled that courts should make every reasonable presumption against a defendant's waiver of the right to counsel. *Russell*, 471 Mich at 193. And where there is any ambiguity pertaining to the defendant's request, a court should not permit the defendant to represent him or herself. *Id.* We find *Russell* to be on point with the issue we address today. Like the defendant in *Russell*, defendant here requested substitute counsel, which the trial court denied. *Id.* at 192-193. Also like the defendant in *Russell*, the instant defendant was given the choice between self-representation and proceeding to trial with his appointed counsel. *Id.* However, unlike in *Russell*, defendant here did not inform the court that he did not want to represent himself. Indeed, in contrast to the defendant in *Russell*, the present defendant plainly suggested that he was willing to represent himself at trial. Accordingly, there was no ambiguity in defendant's request and we cannot conclude that the trial court erred when it determined that defendant's request was unequivocal.

It is clear that the trial court informed defendant of the inherent risks of self-representation, and after learning of those risks, that defendant chose to represent himself. We find that the trial court substantially complied with *Anderson*. See *People v Adkins (After Remand)*, 452 Mich 702, 735; 551 NW2d 108 (1996), overruled in part on other grounds *Williams*, 470 Mich at 641 n 7.

We similarly conclude that the trial court substantially complied with MCR 6.005(D). It is true that the trial court did not separately advise defendant of the charges against him and the potential maximum and minimum sentences that he faced at the time of its colloquy with him. However, the record reflects that prior to trial, defendant knew the maximum and minimum penalties he faced if convicted. Although defendant waived his right to an arraignment, in doing so he acknowledged that he had been read or explained, and that he understood, the substance of the charges against him. And at the time defendant waived his right to an arraignment on the record, the information listed the charges against him as well as the potential maximum and minimum sentences that he faced. Further, during his closing argument, defendant implied to the jury that, if convicted, he would spend the rest of his life in prison. Thus, although the court did not follow the requirements of MCR 6.005(D) as closely as it could have, we nonetheless conclude that it substantially complied with the court rule. See *Adkins*, 452 Mich at 723, 735-736.

Defendant argues that even if the trial court substantially complied with *Anderson* and MCR 6.005(D), he is entitled to a new trial because the trial court did not comply with MCR 6.005(E) at his retrial. While the trial court did fail to comply with the requirements of MCR 6.005(E) at retrial, the error does not warrant reversal. There is no constitutional requirement

that a court obtain a new waiver of the right to counsel at subsequent proceedings. *People v Lane*, 453 Mich 132, 139; 551 NW2d 382 (1996). For that reason, a trial court's failure to comply with the requirements of MCR 6.005(E) is not subject to the same standard as that required for an initial waiver of the right to counsel. *Id.* Instead, a trial court's failure to comply with MCR 6.005(E) is subject to the same standard as any nonconstitutional error. *Lane*, 453 Mich at 140. Because defendant failed to preserve this issue below, defendant is not entitled to relief on this issue unless he can demonstrate that the trial court's error affected his substantial rights. *Id.* Defendant cannot do so.

The record reflects that in the interim between defendant's first trial and the retrial, the prosecution filed a motion in limine to prevent defendant from again representing himself at the retrial. Standby counsel filed a response to the motion, and argued the motion before the court. In arguing the motion, standby counsel informed the court that he and defendant had discussed at length defendant's decision to represent himself. Moreover, standby counsel indicated that defendant still wished to represent himself. Based on standby counsel's representations to the court, it is reasonable to assume that defendant understood that he still had the right to counsel and still wished to proceed without an attorney. Consequently, we find no outcome-determinative plain error with respect to this unpreserved issue. *Id.*

III. Request for Substitute Counsel

Defendant next argues that the trial court abused its discretion when it denied counsel's motion to withdraw and defendant's motion for substitute counsel. Specifically, defendant argues that because the trial court failed to conduct a proper inquiry into the reasons behind the motions, it erroneously denied the motions. The decision to appoint substitute counsel is within the discretion of the trial court, and will not be reversed absent an abuse of discretion. *Russell*, 471 Mich at 192 n 25; *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A trial court's failure to adequately inquire into the reasons behind a dispute between a defendant and defense counsel may constitute an abuse of discretion. See *People v Bass*, 88 Mich App 793, 802; 279 NW2d 551 (1979).

The right to counsel is guaranteed by both the Fifth and Sixth Amendments to the United States Constitution, as well as by Const 1963, art 1, §§ 17 and 20. However, an indigent person entitled to appointed counsel is not entitled to a specific appointed attorney of his or her own choice. *Russell*, 471 Mich 182 at 192 n 25. Although an indigent person may request substitute counsel, the appointment of substitute counsel is only warranted upon a showing of good cause and that the appointment will not unduly disrupt the judicial process. *Traylor*, 245 Mich App at 462. A genuine disagreement over the use of a substantive defense or a fundamental trial tactic is adequate cause, but the defendant's mere allegation that he or she lacks confidence in his or her lawyer is not. *Id.* at 463-464.

We find no evidence in the record that counsel filed either an oral or written motion to withdraw as defendant's counsel. Indeed, the record reflects that counsel merely informed the court of defendant's desire to have substitute counsel appointed. Even if we were to construe counsel's statements as an oral motion to withdraw, there is no indication in the record that counsel was not given the opportunity to fully address the court or that the court failed to inquire into counsel's statements. Similarly, the record reflects that the trial court gave defendant ample opportunity to explain why he should be given substitute counsel. The record also reflects that

the trial court questioned counsel regarding defendant's allegations. Given the timing of defendant's request, the trial court did not believe that there was any merit in defendant's arguments. We find no error in the trial court's handling of the matter.

IV. Directed Verdict

Defendant argues that the trial court erred when it denied his motion for a directed verdict. Specifically, defendant argues that because there was insufficient evidence to convict him, the trial court should have directed a verdict of not guilty. After reviewing the evidence in a light most favorable to the prosecution, *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001), we conclude that a rational trier of fact could have reasonably concluded beyond a reasonable doubt from the evidence adduced that defendant was guilty of unarmed and armed robbery.

The elements of unarmed robbery are: "(1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994); see also MCL 750.530. The elements of armed robbery are: "(1) an assault, and (2) a felonious taking of property from a victim's person or presence, and (3) the defendant is armed with a weapon described in the statute." *Johnson*, 206 Mich App at 123; see also MCL 750.529. Both victims testified that defendant concealed several items in his pockets without paying for them and attempted to leave the store. The victims testified that defendant resorted to violence when they tried to prevent him from leaving the premises with the property. There was also evidence that defendant had possessed a knife at the time. The prosecution presented video and photographic evidence that corroborated the victims' testimony. Any possible inconsistencies in the testimony went to the credibility of the witnesses and the weight and that should be afforded their testimony. In deciding whether to grant defendant's motion for a directed verdict, the trial court properly left these matters to the trier of fact. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). The trial court did not err by denying defendant's motion.

V. Jury Instructions

Defendant also argues that he is entitled to a reversal of his convictions due to instructional errors. However, standby counsel, on defendant's behalf, expressed satisfaction with the trial court's instructions. Defendant did not challenge standby counsel's actions in this regard. We decline to address this issue, which has been waived. *Carter*, 462 Mich at 215-216. But even if defendant had not waived this issue, we find that the trial court's instructions were consistent with the applicable law.¹ Defendant is entitled to no relief on this ground.

VI. Ineffective Assistance of Counsel

¹ Contrary to defendant's argument, Michigan's robbery statutes have now been amended to specify that the force or violence used to perpetrate the robbery offense need not be committed during the course of the larceny, itself, but may be committed "in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." See MCL 750.530, as amended by 2004 PA 128.

Defendant argues that he is entitled to a new trial because he was deprived of the effective assistance of counsel. Again, we find that defendant waived his right to counsel. Therefore, he was not entitled to the effective assistance of counsel. Nor was he entitled to effective standby counsel. *People v Kevorkian*, 248 Mich App 373, 425-426; 639 NW2d 291 (2001). Defendant's argument in this regard must fail.

VII. Judicial Bias

Defendant argues that the trial judge's conduct at trial was so egregious that it deprived him of a fair trial. Defendant failed to preserve this issue for appellate review. And after having thoroughly reviewed the record, we find no outcome-determinative plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). Defendant is entitled to no relief on this issue.

VIII. Prosecutorial Misconduct

Defendant argues that the prosecutor's conduct at trial deprived him of his constitutional right to a fair trial. Defendant failed to preserve this issue below; thus, we review it for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review claims of prosecutorial misconduct on a case-by-case basis, evaluating a prosecutor's actions in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Defendant first argues that the prosecutor knowingly presented false testimony and evidence to obtain a conviction. Specifically, defendant argues that the prosecutor knew or should have known that his witnesses were lying under oath, and his failure to correct the testimony was improper. It is true that a prosecutor may not knowingly use false testimony to obtain a conviction. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A prosecutor thus has a constitutional obligation to report to the defendant and the court whenever a government witness lies under oath, and a duty to correct the false testimony. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Having reviewed the entire record, we do not find any merit in defendant's arguments. Defendant's argument is premised on minor testimonial inconsistencies that in no way establish that any of the challenged witnesses were lying under oath.

Defendant's second argument is that the prosecutor made several statements in his closing argument that were not supported by the evidence. Specifically, defendant argues that the prosecutor made the following improper statements: (1) that defendant fought with officers, (2) that a knife was found near defendant, and (3) that defendant was a drug addict.

Contrary to defendant's argument, there is no evidence in the record that the prosecutor explicitly or impliedly argued that defendant fought with officers when he was found. Although the prosecutor did state that the knife was found near defendant and suggested that defendant had a drug problem, the testimony supported the prosecutor's statements in this regard. Prosecutors are afforded great latitude regarding their arguments and conduct at trial, and are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Defendant has

failed to show plain error affecting his substantial rights with respect to the prosecutor's remarks. See *Callon*, 256 Mich App at 329.

IX. Jury Venire

Criminal defendants are constitutionally entitled to an impartial jury drawn from a fair cross-section of the community. *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975); *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

[T]o establish a prima facie violation of the fair cross-section requirement, a defendant must show “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” [*Id.* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant argues that he was deprived of his constitutional right to a fair and impartial jury because African Americans were systematically excluded from the jury venire. However, defendant has failed to provide any evidence to support his argument. Instead, defendant essentially asks this Court to adopt his assertions as fact and rule accordingly.

Because defendant has presented no specific evidence that African Americans were systematically excluded from the venire, we have no means of conducting a meaningful review of his allegations on appeal. *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003). Thus, we can afford defendant no relief on this issue. *Id.*

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Brian K. Zahra